

UNITED STATES
v.
ISBELL CONSTRUCTION COMPANY

IBLA 70-132

Decided December 30, 1971

Mineral Lands: Mineral Reservation -- Patents of Public Lands: Generally --
Public Lands: Reservations

Patents of

A reservation of all minerals to the United States in a patent of public lands to the State of Arizona pursuant to 43 U.S.C. § 315(g) (1970) reserves valuable deposits of sand and gravel found thereon. No exception to this rule applies where those materials comprise all or substantially all of the land in question because the statute makes provision for the owner of the surface estate to receive payment for damages caused to the land and improvements thereon by mining operations.

Mining Claims: Discovery: Marketability -- Mining Claims: Common Varieties
Generally

of Minerals:

To satisfy the requirements for discovery on placer claims located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date. Where the evidence shows that there

is an abundant supply of similar sand and gravel in the area of the claim, and that no sand and gravel had been or was being marketed from the claim on July 23, 1955, the fact that the material on the claim is sufficient, both as to quantity and quality, as is the abundant supply of similar material in the area, is inadequate to show that material from the particular claim could have been profitably removed and marketed as of July 23, 1955, and the claim is properly declared null and void.

Mining Claims: Discovery: Marketability -- Mining Claims: Common Varieties of Minerals:
Generally

To satisfy the requirements of discovery on placer mining claims located for sand and gravel prior to July 23, 1955, it must be shown that the deposits could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date; where claimant fails to make that showing, the claims are properly declared null and void.

IBLA 70-132 : Arizona Contest Nos.

: 032473, 032474

UNITED STATES

v. : Placer mining claims null
ISBELL CONSTRUCTION COMPANY

: and void; patent applica-
: tions rejected.

: Affirmed

DECISION

Isbell Construction Company has appealed to the Secretary of the Interior from a decision dated February 18, 1970, by the Office of Appeals and Hearings, Bureau of Land Management, which affirmed, with modifications, the decision of a hearing examiner rejecting mineral patent applications AR-032473 and AR-032474 and holding that the two placer mining claims involved are null and void.

The contest was initiated by a complaint issued on December 30, 1964, alleging separately and collectively that:

1. The Agua Fria No. One and the Agua Fria No. Two placer mining claims were not properly located since title to the sand and gravel passed to the State of Arizona in 1945 with the surface patent.
2. No discovery of a valuable mineral deposit has been made within the limits of Agua Fria No. One or the Agua Fria No. Two placer mining claims.

The history of the claims herein at issue can be summarized as follows: On May 19, 1955, Notices of Location of Agua Fria No. One and No. Two placer mining claims were posted. Subsequently, with respect to Agua Fria No. One, an amended location notice dated February 23, 1956, was filed with the Phoenix land office, and application was made for patent on April 15, 1963. With respect to Agua Fria No. Two, the location notice was twice amended, on February 23, 1956, and again on April 29, 1963. An application for patent was filed in the interim on April 15, 1963. Both claims fall within the tracts of land patented on October 10, 1945, by the United States of America to the State of Arizona (Patent Number 1120177). By the terms of the patent "all minerals" in the lands so granted were reserved to the United States. Isbell desires to extract and market sand and gravel from both claims. It asserts that said sand and gravel fall within the mineral reservation of the above patent, and, therefore, the claims involved are patentable to it under the mining laws of the United States.

The record reflects at several points that all, or substantially all, of the surface of the Agua Fria No. One and No. Two claims is composed of sand and gravel with little, if any, silt overburden. The record further reflects that witnesses, both for the government and for Isbell testified that the sand and gravel deposits composing the claims extend below the surface, to a known depth of

at least twenty feet, and reportedly "very deep" -- as much as 500 to 600 feet. The particular deposits herein involved, have prospective use as general building and highway construction materials. The lands surrounding the claims are of similar geological character and sand and gravel therefrom are presently extracted and marketed for similar uses. Thus, this case presents a situation in which no meaningful distinction can be drawn between the mineral composition of the surface and the subsurface of claims sought to be patented.

The question raised in the first charge of the contest complaint is whether the common variety of sand and gravel found on the land passed to and vested in the State of Arizona in 1945, or whether it was reserved to the United States under the terms of the general mineral reservation recited in the patent, and thereby remained subject to location until enactment of the Multiple Surface Resources Act of July 23, 1955, 30 U.S.C. 611 (1964). The hearing examiner avoided the need to decide this issue by holding that the claims were invalid under the second charge of no discovery. On appeal to the Director, Bureau of Land Management, the issue was taken up and decided in favor of the state's ownership of the sand and gravel. That decision then held further that due to the absence of a market in 1955 there had been no discovery of a valuable mineral deposit, so that the claims were invalid in any event.

Appellant alleges error in the Director's decision in that a determination was made with respect to the first charge of the complaint, even though the hearing examiner made no ruling with reference to that charge. We disagree. 5 U.S.C. § 557 (1970). The Administrative Procedure Act, provides that an agency shall have ". . . all the powers which it would have in making the initial decision." The words "all the powers" include determinations of law as well as fact and the agency is clearly free to substitute its judgment for that of the examiner on any or all questions. K. Davis, Administrative Law Treatise § 10.04 (1958). The Director of the Bureau of Land Management was not limited in his consideration of an appeal to the particular question raised by that appeal. Barney R. Colson, 70 I.D. 409 (1963).

Appellant contends that the decision of United States v. Schaub, 163 F. Supp. 875 (D. Alas. 1958), is controlling of this case. We do not so view the matter. Schaub and others located a claim for low-grade sand and gravel of common variety in the Tongass National Forest, Alaska, in 1951. The court merely held that sand and gravel might be considered mineral within the purview of the mining law, that the material in question constituted a valid discovery, and that, under the mining laws in effect when the entry was made, the claim was valid. The case involved no divided ownership of the surface and

mineral estates and, therefore, it contributes very little to our consideration of the first charge. As to the second charge, the issue in Schaub was whether the material was a locatable mineral rather than whether it had sufficient value to constitute a valid discovery as in the case at hand.

Appellant further asserts that the testimony of contestant's witnesses as to conditions on the claims cannot find support in the record. It alleges that the two mining engineers called as witnesses for the government were not physically present on the claims. Our review of the record establishes to our satisfaction that the determination of the hearing examiner, upheld by the decision below, was correct in finding that the witnesses did in fact observe the geological character of the claims from positions on the claims, utilizing automobile speedometers, compasses, U.S.G.S. topographic maps, terrain features, and aerial photographs as aids to ascertain their position. Contrary to appellant's assertion, there is absolutely no record evidence of "denial under oath" of either of the engineers that they in fact were on the claims at the times of their respective inspections, and witness Clemmer stated categorically that he knows that he was on the claims. (Tr. 101).

Authority for the imposition of the reservation is found in the statute, which provides, in pertinent part, that:

When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States; . . .

* * * * *

. . . Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. . . . (43 U.S.C. § 315(g)) (1970)

The reservation of minerals to the United States was expressed in the patent as follows:

Reserving, also, to the United States, all mineral in the lands so granted, together with the right to prospect for, mine, and remove the same, as authorized by subsection 8 [of the Act of June 28, 1934 (48 Stat. 1269)] as amended as aforesaid.

The issues thus presented by the first charge are: (1) whether common sand and gravel are "minerals" reserved to the United States, and (2) if so, whether such deposits which comprise all or substantially all of the land conveyed and are indistinguishable from the soil itself are within the ambit of the reservation.

In ascertaining whether sand and gravel are "minerals" reserved to the United States, we must observe that a diversity of opinion has emanated from the several jurisdictions which have considered somewhat similar questions. See Annotations, 95 A.L.R. 2d 843. It has been held that building sand and gravel is not a "mineral" within the terms of a mineral lease. Praeletorian Diamond Oil Ass'n. v. Garvey, 15 S.W.2d 698 (Tex. Civ. App. 1929); Shell Petroleum Corporation v. Liberty Gravel and Sand Co., 128 S.W.2d 471, 475 (Tex. Civ. App. 1939). In other cases from the same jurisdiction the court held that sand and gravel are not "minerals" within the ordinary and natural meaning unless they are exceptional in character or have a peculiar value. Watkins v. Certain-Teed Products Corp., 231 S.W.2d 981, 985 (Tex. Civ. App. 1950). Atwood v. Rodman, 355 S.W.2d 206 (Tex. Civ. App. 1962). An earlier Alabama case construing a reservation in a deed, held that the word "minerals" means all substances in the earth's crust, sought for and removed for the substance itself, and is not limited to metallic substances but includes salt, coal, clay, stone, etc. McCombs v. Stephenson, 44 So. 867 (Sup. Ct. Ala. 1907). In Washington it was

held that the word "minerals" as used in grants and reservations of mineral rights is not a definite term and is susceptible of limitations or extensions according to the language employed, the surrounding circumstances, and the intention of the grantor, if it can be ascertained. Puget Mill Co. v. Duecy, 96 P. 2d 571 (Sup. Ct. Wash. 1939). A recent Minnesota decision holding that sand and gravel were not reserved to grantors by a deed "also accepting mineral reservations", stated that the rule that ambiguities in deeds must be resolved in favor of the grantee is modified by the rule that in construing reservations and exceptions in deeds, the proper method is to determine the intention of the parties from the entire deed and surrounding facts and circumstances. Resler v. Rogers, 139 N.W.2d 379 (Sup. Ct. Minn. 1965). In Michigan a conveyance of state-owned land which was subject to a reservation of all "mineral", coal, oil and gas was held to have reserved the sand and gravel to the state. Matthews v. Department of Conservation of the State of Mich., 96 N.W.2d 160 (Sup. Ct. Mich. 1959). A Pennsylvania court held that, according to the circumstances, sand may or may not be a mineral, within the meaning of a certain state statute which accorded double damages for the unlawful removal of "minerals." Hendler v. Lehigh Valley Railroad Company, 58 Atl. 488 (Sup. Ct. Penn. 1904). A Louisiana court found that "sand" and "gravel" have been classed "natural resources" as distinguished from "minerals." Holloway Gravel Company v. McKowen, 9 So. 2d 228 (Sup. Ct. La. 1942). Sand and gravel were described as "nonmetallic minerals" in Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959).

The enactment of the Multiple Surface Resources Act, supra, did not alter the status of reserved minerals. Cf. State Land Dept. v. Tucson Rock and Sand Co., 481 P.2d 867 (Sup. Ct. Ariz. 1971). Solicitor's Opinion, M-36417 of February 15, 1957, contains the following statements:

The removal of sand, gravel and certain other low-grade mineralized substances from the operation of the mining laws by Public Law 167, 84th Cong. (69 Stat. 367, 30 U.S.C. sec. 601, et. seq) has no relation to the question of whether a reservation of "coal and other minerals" under section 9 of the Stockraising Homestead Act (43 U.S.C. sec 299) includes them.

* * * * * *

. . . If these mineral materials in a given case meet the standard definition for "valuable minerals" as applied to low-grade deposits they must be deemed valuable and being minerals they are "valuable minerals" even though they are no longer such within the meaning of the mining law. See Solicitor's Opinion, M-36384 (October 19, 1956). . . .

Inasmuch as valuable deposits of sand and gravel were, for many years, regarded as minerals subject to location under the General Mining Law of 1872, 30 U.S.C. 22, et. seq (1970); and since the enactment of the Multiple Surface Resources Act, did not affect the mineral character of these materials, we conclude that valuable deposits of common sand and gravel are minerals, and as such would ordinarily be reserved to the United States under a reservation of "minerals."

Having so decided, we face the question of whether the circumstances of this case warrant a finding that this particular deposit was not reserved to the United States, but passed to the patentee. Usually the task of interpretation is solely for the courts, as controversies between surface owners and mineral claimants pass beyond the jurisdiction of the land department. Berg v. Taylor, 51 L.D. 45 (1925). But in this instance our jurisdiction has been invoked by the necessity of acting upon appellant's application for patent of the mineral estate.

The extraction of valuable mineral substances does not deny to the surface patentee the enjoyment of his estate so long as mining activities do not devour the surface. 1 American Law of Mining, § 3.26 (Rocky Mountain Mineral Law Foundation). The reservation of minerals to the United States should be construed by considering the purpose of the grant for reservation in terms of the use intended. By applying such a construction, the reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and have a separate value. The majority rule appears to be that it makes no difference whether the particular substance was known to be valuable at the time of severance, or becomes known to be of value as the result of future development of the arts and sciences. Such an approach would exclude nothing that is presently or prospectively valuable as extracted substances. Id. However, a minority rule has also developed which emphasizes that the interpretation to be given

the term "minerals" is dependent upon popular understanding of what substances are known as minerals at the time of execution of the instrument. New Mexico & Arizona Land Company v. Elkins, 137 F. Supp. 767 (D.N.M. 1956). See also, C. Lindley, A Treatise on the American Law Relating to Mines and Mineral Lands, § 93 (3d ed. 1914).

An English court of appeal has held that sand and gravel were not reserved as "minerals" or "mineral substances" in the vernacular of the mining world, the commercial world, or landowners, and as sand and gravel constituted the ordinary soil of the district, it would negate the substance of the transaction to hold that all sand and gravel which were generally a part of the soil and subsoil of the farm and obtained from the surface were reserved to the grantor. Waring v. Foden, 1 Ch. 276, 86 A.L.R. 969 (1932).

In Hartwell v. Camman, 64 Am. Dec. 448, 451 (1854), the New Jersey Court of Chancery, in construing the terms of a conveyance granting "all mines, minerals, opened or to be opened," stated:

By the use of the terms "mines" and "minerals," it is clear that the grantor did not intend to include everything embraced in the mineral kingdom, as distinguished from what belongs to the animal and vegetable kingdom. If he did, he parted with the soil itself. . . .

In Mississippi, the court held that the intention of the party controlled the effect of a reservation of "all minerals both liquid and solid" to the grantor, and ruled that in view of the fact that gravel was under all of the land conveyed and that oil had been discovered in the area five years prior to the making of the deed, the reservation did not include sand and gravel. Witherspoon v. Campbell, 69 So. 2d 384 (Sup. Ct. Miss. 1954).

The judicial opinion most in point is Farrell v. Sayre, 270 P.2d 190 (Sup. Ct. Colo. 1954), rehearing denied; in which Sayre conveyed the surface of the land involved to another, ". . . excepting and reserving all mineral and mineral rights and rights to enter upon the surface of the land and extract the same . . ." Some of the area involved is placer ground but the entire surface of the land so conveyed is nothing but sand and gravel. In reversing the trial court, the Supreme Court of Colorado, sitting en banc, said that to uphold Sayre's contention that he had reserved the sand and gravel would be tantamount to saying that originally Sayre retained all that he granted; that the deed served no useful purpose; and that the grantee received nothing. The court found that at the time of making the deed Sayre, as grantor, had no intention of reserving to himself that which he had granted, namely the sand and gravel on the surface of the land, and held that the grantor had retained no rights thereto by virtue of the mineral reservation. See Psencik v. Wessels, 205 S.W.2d 658 (Tex. Civ. App. 1947), error ref.

In a somewhat analogous case, the United States, in the exercise of eminent domain, provided in its declaration of taking that all gas, oil and "other minerals" in and under said land were reserved to the owners of the subsurface estate. The successor in interest to the reserved minerals later asserted a right to remove gravel which was found exposed on the surface of the land. The court held that under the maxim of construction ejusdem generis, gravel was not included within the intent of the reservation and, further, that a reservation of the subsurface estate did not include gravel which was exposed at the surface and lying near the surface of the land. Bumpus v. United States, 325 F.2d 264 (10th Cir. 1963).

The question has been previously considered by the Bureau of Land Management's now defunct Office of Appeals and Hearings, which held that where the land which was patented to the State of Arizona, with a reservation of minerals to the United States, consisted almost entirely of sand and gravel those substances had passed to the state and were not reserved, so that the State Highway Department's application for a material site should be rejected. Arizona State Dept. of Highways, Arizona 030560, etc. (November 8, 1961). The appeal by the Highway Department to the Secretary was dismissed on the ground that, as the Bureau decision recognized the state's ownership of the material sought, the state agency had no standing to appeal from a decision which was not adverse to the interest of

the state. Arizona State Highway Department, A-29325 (October 21, 1963).

The Supreme Court of Oregon in construing a mineral reservation, said:

If we were to hold in this case that the right to extract sand and gravel was reserved to the grantor, we would have to assume that those who purchase land subject to a mineral reservation do so in contemplation of the possible destruction of their interest in the event that gravel lies under the surface of the land conveyed. We do not believe that parties to land transactions in this state normally have this understanding of the effect of a mineral reservation. We hold that the right to the sand and gravel in the land conveyed to defendant passed by the deed and that plaintiff has no right to recover for their removal. Whittle v. Wolff, 437 P.2d 114 (Sup. Ct. Ore. 1968).

The case of Smith v. Moore, 474 P.2d 794 (Sup. Ct. Colo. 1970) involved a conveyance with a reservation of minerals together with "the right to ingress and egress upon said land for the purpose of mining said coal, oil and gas and other minerals together with enough of the surface of the same as may be necessary and reasonable for the proper and convenient working of such minerals. . . ." Coal had been mined from the property continuously by underground methods for many years prior to the conveyance. After the conveyance the grantor determined that underground mining was no longer feasible and that the coal should be extracted by a stripping operation at

the surface. The surface owner objected. The owner of the mineral estate contended that the reservation included the right to destroy the surface to the extent necessary and reasonable for the proper mining of the underlying minerals. The court found that the circumstances did not warrant the conclusion that the parties to the conveyance bargained in contemplation that strip mining would be necessary and that extensive destruction of the surface might be authorized without compensation, saying:

If we were to . . . find that the plaintiff has the right to destroy any portion of the surface necessary for proper working of the coal without compensation to the defendants, we would in effect be holding that the grantor retained everything he granted by his deed, and that the grantee received nothing.

While Smith v. Moore, supra, deals with the surface mining of coal rather than sand and gravel, it enunciates a theme that is common to all of these decisions; i.e. the concern by the several courts that the grantor, if he prevailed, would have retained dominion over that which he purportedly conveyed and the grantee would be deprived of the very substance of his bargain without compensation.

It is this aspect of the matter which distinguishes all of the foregoing cases from the case at hand. Here the statute under which the conveyance was made, and which provides the authority for the reservation states:

. . . Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. . . . 43 U.S.C. 315g(d). (Emphasis added).

Here the Congress has foreseen the possibility of damage to the surface by reason of the reservation of minerals and has made provision for the owner of the surface to be compensated. This obviates the need for special concern where the mineral in question comprises substantially all of the surface. See discussion and cases collected in 1 Amer. Law of Mining § 3.51.

[It is noteworthy that Congress also provided a similar indemnity to surface owners of land patented with a mineral reservation pursuant to a stock raising or other homestead entry for surface damages occasioned by open pit or strip mining. 30 U.S.C. 54 (1970).]

It being our opinion that valuable deposits of sand and gravel are reserved to the United States, and finding that there is no reason to impose an exception to that rule for the protection of the surface owner, it is our further opinion that the sand and gravel deposits here

in question did not pass to the State of Arizona but were reserved to the United States, conditioned only upon a finding that the said deposits are valuable. Accordingly, the decision appealed from is reversed as to its holding with reference to the first charge of the complaint.

This brings us to the second charge which alleges that no discovery of a valuable mineral deposit has been made within the claims. Both claims were located in May 1955. The evidence is conclusive of the fact that the sand and gravel in question are common varieties, principally suitable for construction purposes. See United States v. Lloyd Ramstad, A-30351 (September 24, 1965); United States v. Mount Pinos Development Corp., 75 I.D. 320 (1968).

Since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C. § 611 (1970), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date. Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); United States v. Barrows, 404 F.2d 749 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969); United States v. William A. McCall, Sr., 2 IBLA 64; 78 I.D. 71 (1971); United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285 (1971).

In summary, the evidence, described in considerable detail in the two decisions below, is that no sand or gravel has been extracted from the claims and sold at any time. Appellant did utilize 20,000 tons of the material in construction of its own properties in the winter of 1956-57, 6,300 tons in 1963, and 4,200 tons in 1964. These were used in constructing appellant's own office, warehouse, dock facilities, airstrip, and other improvements.

The evidence presented by both sides makes copious reference to the activities on the private land adjacent to the contested claims, now held by Arizona Sand and Rock Company. The company's predecessor, Phoenix Concrete and Construction Company built a sand and gravel plant on the property in 1959. This was the first sand, rock and concrete plant in the area. Arizona Sand and Rock Company took over the property in 1959. In 1959 Sun City, Arizona, was built, creating a market. Beginning in 1959 Arizona Sand and Rock Company produced from its own properties adjacent to the claim for its ready mixed plant, and gained a dominate market position. Lloyd A. Foster, an officer of Arizona Sand and Rock Company testified, "The latter part of '59, I think, is when they started there or had completed their planning on the Sun City development and actually work started getting pretty heavy in there in the early part of '60."

Reporting on the subject claims in 1963, a Bureau of Land Management mining engineer wrote, "It can be assumed that a market has existed in the vicinity since 1959, but with reserves held by Arizona Sand and Gravel (Rock) it would be difficult for a competitor to obtain any of the existing market." This view is reinforced by testimony to the effect that Arizona Sand and Rock is capable of serving a larger market and that it has sufficient material on the adjacent land to satisfy the existing markets for the next 10 to 20 years. This, coupled with the fact that the appellant has made no effort to capture a portion of the market that since has come into being, is indicative of the impracticality of a commercial development of the deposit. However, this decision does not rest upon our analysis of the present or potential marketability of the material, since our determination of the status of the claims must be based upon their validity as of July 23, 1955.

The testimony of Thurman Byars, Vice President of the appellant corporation and one of the original locators of the contestant claims, points up the fact that the claims were located with a view toward taking advantage of a trend which indicated that a future market would develop rather than to enter a market in existence at the time:

Q. At the time these claims were located, what was the reason that they were located in this particular spot?

A. The reason that they were primarily located was for the quality of the materials, and in what we considered an area that could probably be developed later as a good market for those materials. (Tr. 143)

* * * * *

Q. At the time the claims were located in 1955 by Isbell, what market for those materials existed in that area?

A. We looked primarily to the -- I am going to call it for want of better words, fringes of how the community were [sic] expanding to the northwest, and as been stated before, hauls often determine marketability. We felt the area in which the community was moving to the northwest offered the greatest market for this particular product. (Tr. 144)

On cross examination, he testified as follows:

Q. And I believe you made the statement that you felt that these two claims under discussion here today could be developed to handle future market as it came into being?

A. Yes. (Tr. 164)

This evidence that the claims were located on May 19, 1955, in anticipation that they were in an area "that could probably be developed later as a good market" takes on critical significance in light of the fact that the claims had to be valid on July 23, 1955, to subsist beyond that date. There is no evidence that a profitable market for the materials on these claims came into being in that two-month interval. To satisfy the requirement of discovery on

placer mining claims located for sand and gravel prior to July 23, 1955, it must be shown that the deposit could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date; where the claimant fails to make that showing, the claims are properly declared null and void. United States v. Clear Gravel Enterprises, Inc., supra. What is required under the "marketability test" for "valuable mineral deposits" is that there be, at the time discovery is alleged, a market for the discovered material which is sufficiently profitable to attract the efforts of persons of ordinary prudence, and locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained. Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971).

The appellant's removal of sand and gravel from its claims for construction of its own facilities may be regarded as sales, and it may even be assumed that such use was profitable. However, this cannot serve to validate the claims for two reasons. First, the initial use of the sand and gravel came approximately a year and a half after the critical date. Second, the isolated use for the limited construction of its own facilities cannot be equated with or substituted for an existing market. Moreover, it raises the question of why, if a market demand existed in 1955-57, the appellant made no sales after it had opened the pits on its claims and brought in the necessary equipment to extract and remove the material for its own use, particularly

since there was no competing production from the adjacent land at that time.

We are obligated to conclude that no market existed on July 23, 1955, sufficient to enable appellant to show that by reason of bona fides in development, proximity to market, the existence of a present demand, and other factors, the deposit was of such value that it could have been mined, removed and disposed of at a profit. Foster v. Seaton, *supra*; Layman v. Ellis, 52 L.D. 714 (1929).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed as hereby modified.

Edward W. Stuebing, Member

We concur:

Martin Ritvo, Member

Joan B. Thompson, Member

